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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~458~~. 48

RUFUS CHENEY, LATE COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT IN THE STATE OF WISCONSIN, PLAINTIFF IN ERROR,

vs.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, AND BENJAMIN F. ALDRICH, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED JANUARY 4, 1871.

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INDEX.

	Original.	Print.
Petition for writ of certiorari	1	1
Writ of certiorari to circuit court, Milwaukee County	4	3
Marshal's return to same	5	3
Return of clerk circuit court of Milwaukee County to same	5	3
Declaration	8	6
Plea	12	9
Trial and verdict and judgment	13	9
Stipulation as to writ of error ordered by Secretary of Treasury	14	10
Bill of exceptions	14	11
Clerk's certificate	35	23
Writ of error	36	23
Citation and service	37	23

1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday (being the third day) of October, A. D. 1870—

Present, the Honorable Andrew G. Miller, district judge, presiding; Charles S. Hamilton, marshal; Edward Kurtz, clerk—

Among other, the following proceedings were had, to wit:

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, & Benjamin F. Aldrich
vs.
RUFUS CHENEY, LATE COLLECTOR OF INTERNAL revenue, for the first collection district in the State of Wisconsin. } At law.

Be it remembered that heretofore, to wit, on the twenty-fourth day of June, A. D. 1870, came the defendant, by his attorney, Mr. G. W. Hazelton, and presented to the clerk his petition in writing as herein filed, together with a certificate of counsel as required by law, praying that a writ of certiorari may issue to the circuit court of Milwaukee County, in the State of Wisconsin, requiring said court to send to this court the record and proceedings in the above-entitled cause in said court, the defendant being late collector of internal revenue for the first collection district in the State of Wisconsin; which petition and other papers are as follows, to wit:

Petition for writ of certiorari.

UNITED STATES OF AMERICA,
District of Wisconsin:

To the honorable the circuit court of the United States for the district of Wisconsin:

2 Your petitioner, Rufus Cheney, respectfully represents: That, on the 24th day of June, 1870, in the circuit court of Milwaukee County, State of Wisconsin, an action was commenced by George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich, plaintiff, against your petitioner, defendant, by summons, a copy of which is hereto annexed, & marked "A," and made a part of this petition. That no proceedings have been had in said action on the part of this defendant, and no trial had therein. That this defendant was late collector of internal revenue for the first collection district for the State of Wisconsin. That the said action brought by said plaintiffs against your petitioner for an alleged wrongful collection of tax of personal property belonging to the said plaintiffs, but this your petitioner states that the several acts done by this petitioner and of which the plaintiffs complain, were done by your petitioner by virtue of his office as collector aforesaid, and under the revenue laws of the United States, and by virtue and under color thereof, and for the purpose of collecting an assessment lawfully made against the said plaintiffs under the laws of the United States, and not otherwise.

Your petitioner therefore prays that a certiorari be issued in due form of law, and that said action and the record and proceedings therein be transferred to this court.

RUFUS CHEENY,
By GEO. W. LAKIN, *Att'y.*

Subscribed & sworn to before me this 23d of June, 1870.

Clerk of U. S. circuit court, Wis.

I certify that, as counsel for the petitioner, I have examined the proceedings against him in the action above set forth, and have carefully inquired into all the matters set forth in the above petition, and that I believe the same to be true as set forth in said petition.

G. W. HAZELTON,
U. S. Att'y Dist. Wis.

3 Ex. A.

Circuit court, Milwaukee County.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, and Benjamin F. Aldrich
against
RUFUS CHEENEY, LATE COLLECTOR OF INTERNAL revenue for the first collection district in the State of Wisconsin.

The State of Wisconsin to the above-named defendant:

You are hereby summoned, and required to answer the complaint in this action, which will be filed in the office of the clerk of the circuit court of the county of Milwaukee, at the clerk's office, in the city of Milwaukee, and to serve a copy of your answer to the said complaint on the subscribers at their office, in Mitchell's bank building, in the city of Milwaukee, and State of Wisconsin, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of eleven hundred and thirty-eight dollars and forty-three cents, with interest on two hundred and twenty dollars and sixty-three cents of said sum from the 26th day of October, 1866; with interest on two hundred and thirty dollars & fifty-eight cents of said sum, from the 27th day of November, 1866; with interest on two hundred and seventy-one dollars and eighty-six cents of said sum from the 29th day of December, 1866; with interest on one hundred & ninety seven dollars and fifty-nine cents of said sum, from the 29th day of January, 1867; with interest on ninety-two dollars & thirteen cents of said sum, from the 26th day of February, 1867, and with interest on one hundred & twenty-five dollars & sixty-four cents of said sum from the 1st day of April, 1867, besides the costs of this action.

Dated Milwaukee, June 9th, 1870.

JOHN W. & A. L. CARY,
Plaintiffs' Attorneys, Milwaukee, Wis.

I hereby certify that the within is a true copy of the original summons in this action, and that I served same on defendant.

June 24th, 1870.

ALFRED L. CARY.

4 Whereupon a writ of certiorari, issued in duplicate, as follows, to wit:

Certiorari.

THE UNITED STATES OF AMERICA,
District of Wisconsin, ss:

[SEAL.] The President of the United States of America to the circuit court for Milwaukee County, in the State of Wisconsin, greeting:

Whereas Rufus Cheney, late collector of internal revenue for the first collection district, in the State of Wisconsin, defendant, in a certain cause in said circuit court, wherein George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich are plaintiffs, pursuant to section sixty-seven of an act of Congress, entitled "An act to declare the meaning of certain parts of the internal revenue act, approved June 30, 1864, and for other purposes," approved July 13, 1866, has this day presented to the clerk of the circuit court of the United States for the district of Wisconsin, his petition for a writ of certiorari to transfer said cause to this court, together with a certificate signed by an attorney of the circuit court of the United States for this district, setting forth that, as counsel for the petitioner, he has examined the proceedings against him, and carefully enquired into all the matters set forth in the petition, and that he believes the same to be true.

Therefore, you are hereby commanded that you send the record and proceedings in said cause wherein George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich are plaintiffs, and Rufus Cheney, late collector of internal revenue for the first collection district in the State of Wisconsin, is defendant, to the said circuit court of the United States for the district of Wisconsin, without delay.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in said district of Wisconsin, this twenty-fourth day of June, in the year of our Lord one thousand eight hundred and seventy, and of our independence the 94th.

EDWARD KURTZ,
5 *Clerk of the Circuit Court of the United States for the District of Wisconsin.*

Return.

Certiorari returned:

"Served by delivering personally to James Hickox, clerk of circuit court of Milwaukee County, a duplicate original of this writ, June 28th, 1870.

"Fees, $2 06.

"C. S. HAMILTON, *Marshal.*"

JULY 16, 1870.—Record and proceedings in the circuit court for Milwaukee County, duly certified by the clerk of said court as his return to the writ of certiorari, with duplicate certiorari annexed thereto, filed, as follows:

Certified record from State court.—Clerk's return to certiorari.

Pleas before the Honorable David W. Small, judge of the second ju-

dicial circuit of the State of Wisconsin, and presiding judge of the circuit court within and for the county of Milwaukee, in said State, at a term of said court begun and holden at the court-house in the city of Milwaukee, on the fourth Monday of June, A. D. 1870.

JAMES HICKOX, *Clerk.*
GUSTAV BRUNST, ESQ'R., *Sheriff.*

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, and Benjamin F. Aldrich
against
RUFUS CHENEY, LATE COLLECTOR OF INTERNAL revenue for the first collection district in the State of Wisconsin.

Be it remembered that heretofore, to wit, on the 5th day of July, A. D. 1870, came the said plaintiffs, by their attorneys, and filed in the office of the clerk of the court aforesaid their certain summons and affidavit of service thereof, in the words and figures following, to wit:

Circuit court, Milwaukee County.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, and Benjamin Aldrich
against
RUFUS CHENEY, LATE COLLECTOR OF INTERNAL revenue for the first collection district in the State of Wisconsin.

6 The State of Wisconsin to the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the circuit court of the county of Milwaukee, at the clerk's office in the city of Milwaukee, and to serve a copy of your answer to the said complaint on the subscribers, at their office in Mitchell's bank building, in the city of Milwaukee, and State of Wisconsin, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of eleven hundred and thirty-eight dollars and forty-three cents, with interest on two hundred and twenty dollars and sixty-three cents of said sum, from the 26th day of October, 1866; with interest on two hundred and thirty dollars and fifty-eight cents of said sum, from the 27th day of November, 1866; with interest on two hundred and seventy-one dollars and eighty-six cents of said sum, from the 29th day of December, 1866; with interest on one hundred and ninety-seven dollars and fifty-nine cents of said sum, from the 29th day of January, 1867; with interest on ninety-two dollars and thirteen cents of said sum, from the 26th day of February, 1867; and with interest on one hundred and twenty-five dollars and sixty-four cents of said sum, from the 1st day of April, 1867, besides the costs of this action.

Dated Milwaukee, June 9th, 1870.

JOHN W. & A. L. CARY,
Plaintiffs' Attorneys, Milwaukee, Wis.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Alfred L. Cary, being duly sworn, deposes and says that, on the 24th

day of June, A. D. 1870, at the city of Milwaukee, in the county of Milwaukee, and State of Wisconsin, he served the within summons upon the within defendant, Rufus Cheney, by delivering to him personally, and leaving with him, a true copy thereof; that he knew the person so served with said summons to be the same Rufus Cheney named as defendant therein. Deponent further says that he endorsed upon
7 the said copy of summons which he delivered to said defendant as aforesaid, the following words, to wit: "I hereby certify that the within is a true copy of the original summons in this action, and that I served same on defendant June 24th, 1870. Alfred L. Cary."

ALFRED L. CARY.

Sworn to before me this 24th day of June, 1870.

GEO. COGSWELL,
Notary Public, Mil. Co., Wis.

Same day, to wit, July 5, 1870, duplicate writ of certiorari to the circuit court of the United States for the district of Wisconsin, filed.

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

I, James Hickox, clerk of said court, do hereby certify that I have compared the foregoing copy with the original record and proceedings entered in the action therein entitled; that it is a correct transcript therefrom and of the whole thereof, as the same remains of record in my office; and I return, hereto annexed, the duplicate writ of certiorari issued out of the circuit court of the U. S. for the district of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 7th day of July, A. D. 1870.

[SEAL.] JAMES HICKOX, *Clerk.*

(Duplicate.)

THE UNITED STATES OF AMERICA,
District of Wisconsin, ss:

[SEAL.] The President of the United States of America to the circuit court for Milwaukee County, in the State of Wisconsin, greeting:

Whereas Rufus Cheney, late collector of internal revenue for the first collection district in the State of Wisconsin, defendant in a certain cause in said circuit court, wherein George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich are plaintiffs, pursuant to section sixty-seven of an act of Congress entitled "An act to declare the
8 meaning of certain parts of the internal revenue act, approved June 30, 1864, and for other purposes," approved July 13, 1866, has this day presented to the clerk of the circuit court of the United States for the district of Wisconsin, his petition for a writ of certiorari to transfer said cause to this court, together with a certificate signed by an attorney of the circuit court of the United States for this district setting forth that, as counsel for the petitioner, he has examined the proceedings against him, and carefully enquired into all the matters set forth in the petition, and that he believes the same to be true.

Therefore you are hereby commanded that you send the record and proceedings in said cause, wherein George T. Van Arsdale, Alvin F.

Durant, and Benjamin F. Aldrich are plaintiffs, and Rufus Cheney, late collector of internal revenue for the first collection district in the State of Wisconsin, is defendant, to the said circuit court of the United States for the district of Wisconsin without delay.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States at the city of Milwaukee, in said district of Wisconsin, this twenty-fourth day of June, in the year of our Lord one thousand eight hundred and seventy, and of our independence the 94th.

EDWARD KURTZ,
Clerk of the Circuit Court of the United States for the District of Wisconsin.

Received June 28, 1870, and filed July 5, 1870.

HICKOX, *Clerk.*

AUGUST 1, 1870.—This day came the plaintiffs, by their attorneys, and filed their declaration as follows:

Declaration.

Circuit court of the United States for the eastern district of Wisconsin.
Of the first Monday of August, A. D. 1870.

EASTERN DISTRICT OF WISCONSIN, *ss:*

9 George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich, partners in business, under the name and style of "Durant, Van Arsdale & Co., and who are citizens of the State of Wisconsin, by John W. & A. L. Cary, their attorneys, complain of Rufus Cheney, late collector of internal revenue for the first collection district in the State of Wisconsin, of a plea of trespass on the case upon promises.

For that whereas the said plaintiffs, heretofore, to wit, from the first day of September, A. D. 1866, to the first day of March, A. D. 1867, at the city of Kenosha, in said eastern district of Wisconsin, being manufacturers of thimble-skeins and pipe-boxes from cast-iron, had manufactured a large quantity, to wit, $379\frac{952}{2000}$ tons of cast-iron thimble-skeins and pipe-boxes, to wit, at their certain manufactory in the said city of Kenosha, in the county of Kenosha, and State of Wisconsin; and whereas the said defendant during all that time, and up to and at the time of the payments to said defendant hereinafter mentioned, held the office and exercised the duties of collector of internal revenue of the United States for the first collection district in said State of Wisconsin; and whereas the assessor of internal revenue of the United States for said district assessed on said plaintiffs, in respect to the said thimble-skeins and pipe-boxes so manufactured by them as aforesaid, a pretended tax, to wit, of three dollars for each and every ton of two thousand pounds, which said tax, so assessed, amounted to a great sum of money, to wit, to the sum of one thousand one hundred and thirty-eight dollars and forty-three cents, whereas in truth and in fact the said thimble-skeins and pipe-boxes so manufactured by said plaintiffs as aforesaid were by law exempt from said tax, or any tax to the said United States, and the plaintiffs aver that they protested against the imposition and payment of said pretended tax; and whereas said plaintiffs, afterwards, at various dates and times, and at the district aforesaid, were compelled to and did pay to said defendant, under protest, the said pretended and illegal tax of one thousand one hundred thirty-eight dollars and forty-

10 three cents so as aforesaid assessed upon said plaintiffs in respect to the said thimble-skeins and pipe-boxes so manufactured by them as aforesaid, which said payments were made at the times and in the sums following, to wit: On the 26th day of October, A. D. 1866, the sum of two hundred and twenty dollars and sixty-three cents; on the 27th day of November, A. D. 1866, the sum of two hundred and thirty dollars and fifty-eight cents; on the 29th day of December, A. D. 1866, the sum of two hundred and seventy-one dollars and eighty-six cents; on the 29th day of January, A. D. 1867, the sum of one hundred and ninety-seven dollars and fifty-nine cents; on the 26th day of February, A. D. 1867, the sum of ninety-two dollars and thirteen cents; and, on the day of March, A. D. 1867, the sum of one hundred and twenty-five dollars and sixty-four cents: And whereas, afterwards, to wit, on or about the 14th day of July, A. D. 1869, said plaintiffs made an appeal to the Commissioner of Internal Revenue of the United States from the said erroneous and illegal assessment upon and collection of said plaintiffs of said pretended tax, which said appeal was made according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and by which said appeal said plaintiffs claimed and demanded that said Commissioner of Internal Revenue should remit, refund, and pay back to said plaintiffs the taxes so as aforesaid erroneously and illegally assessed upon and collected of said plaintiffs; that said Commissioner of Internal Revenue entertained said appeal, and on or about the 28th day of April, A. D. 1870, decided the same adversely to said plaintiffs; and whereas this suit was brought by said plaintiffs against said defendant within six months from the time of the decision of said Commissioner of Internal Revenue upon said appeal, by means of which said several premises the said defendant then and there became liable to reimburse and pay back to said plaintiffs the said sum of money, to wit, the sum of one thou-

11 sand one hundred and thirty-eight dollars and forty-three cents, which said plaintiffs had so as aforesaid been compelled to and did pay to said defendant, under protest, for the said pretended and illegal tax so as aforesaid assessed upon said plaintiffs in respect to the said thimble-skeins and pipe-boxes so manufactured by them as aforesaid; and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the first day of May, A. D. 1870, at the eastern district of Wisconsin aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them the said last-mentioned sum of money, when he, the said defendant, should be thereunto afterwards requested; yet the said defendant, although often requested, &c., hath not yet paid the said sum of money last above-mentioned, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs, the said defendant hath hitherto altogether refused, and still does refuse.

And for that whereas the said defendant, on the first day of May, in the year one thousand eight hundred and seventy, at the said eastern district of Wisconsin, was indebted to the said plaintiffs in the sum of two thousand dollars, lawful money of the United States of America, for the work and labor, care and diligence of the said plaintiffs by the said plaintiffs before that time done, performed, and bestowed in and about the business of the said defendant, and for the said defendant, and at the special instance and request of the said defendant, and also for divers materials and other necessary things by the said plaintiffs found, provided, used, and applied in and about that work, at the special instance and request of the said defendant, and being so indebted to the

said plaintiffs the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned, when the said defendant should be thereunto afterwards requested; and whereas, also, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendant done, performed, and bestowed divers other work and labor, care and diligence, in and about the business of the said defendant, and for the said defendant, and had before that time found, provided, used, and applied divers other materials and other necessary things in and about that business, the said defendant then and there undertook and faithfully promised the said plaintiffs that the said defendant would well and truly pay the said plaintiffs so much money as the said plaintiffs reasonably deserved to have of the said defendant for the same, when the said defendant should be thereunto afterwards requested; and the said plaintiffs aver that the said plaintiffs, therefore, reasonably deserve to have of the said defendant for the same the further sum of two thousand dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, had notice; and whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiffs in the sum of two thousand dollars, of like lawful money as aforesaid, for divers goods, wares, and merchandise by the said plaintiffs, before that time sold and delivered to the said defendant, and at the like request of the said defendant; and in the further sum of two thousand dollars, of lawful money as aforesaid, for so much money before that time lent and advanced by the said plaintiffs to the said defendant, and at the like request of the said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers others sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there found to be in arrear and indebted to the said plaintiffs in the further sum of two thousand dollars, of like lawful money as aforesaid; and being so found in arrear, and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereuto afterwards requested.

Nevertheless, the said defendant, although often requested, &c., has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiffs, but to pay the

same or any part thereof to the said plaintiffs the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiffs of two thousand dollars, and therefore the said plaintiffs bring suit, &c.

JOHN W. & A. L. CARY,
Plaintiffs' Attorney.

12 And same day plaintiff's attorneys entered in the order and rule book the following rule, to wit:

Rule to plead.

Of the first Monday of August, A. D. 1870.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, and Benjamin F. Aldrich
vs.
RUFUS CHEENEY, LATE COLLECTOR OF INTERNAL REVENUE, &c.

On motion of John W. & A. L. Cary, plaintiffs' attorneys, ordered that the defendant plead to the plaintiffs' declaration, on file, by the first Monday of September next, or his default will be entered.

JOHN W. & A. L. CARY,
Plaintiffs' Attorneys.

AUGUST 9, 1870.—This day came the defendant, by his attorney, Mr. G. W. Hazelton, and filed his plea, as follows:

Plea.

Circuit court of the United States, eastern district of Wisconsin.

RUFUS CHEENEY
ads.
GEORGE T. VAN ARSDALE ET ALS.

And now comes the defendant, by G. W. Hazelton, his attorney, and defends the wrong and injury, when, &c., and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country.

By G. W. HAZELTON,
Deft's Att'y.

And now, at this same term, to wit, October term, A. D. 1870, and on the forty-second day thereof, to wit, on the twenty-sixth day of November, A. D. 1870—present, the Honorable Andrew G. Miller, district judge, presiding—the following proceedings were had, to wit:

13 GEORGE T. VAN ARSDALE, ALVIN F. DURANT, & Benjamin F. Aldrich
vs.
RUFUS CHEENEY, LATE COLLECTOR OF INTERNAL REVENUE for the 1st coll'n district in the State of Wisconsin. } At law.

Trial & verdict.

This day came the parties, by their counsel, and the issue herein came

on to be tried, whereupon a jury was called to try the same, who came, to wit: James Sidell, Enos Gay, James R. Morris, William Langton, George K. Gregory, George Bowman, Peter Martineau, Thomas J. Freeman, Samuel Hayt, M. C. Cook, Isaac Sellick, and Frederick Wardner, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled. And the jurors of the jury aforesaid being charged by the court on their said oaths, respectively, do say that the defendant did assume and promise in manner and form as the plaintiffs have herein declared against him, and assess the damages to the said plaintiffs at the sum of one thousand four hundred and forty-nine dollars and fifty-five cents.

And afterwards, to wit, on the forty-fourth day of said term, to wit, on the twenty-ninth day of November, A. D. 1870, the following proceedings were had, to wit:

Judgment.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, & Benjamin F Aldrich
vs.
RUFUS CHENEY, LATE COLLECTOR OF INTERnal revenue for the 1st coll'n dist. in the State of Wisconsin. } At law.

This day came the plaintiffs, by their counsel, and no motion for a new trial being filed, it is considered and adjudged by this court now here that the said plaintiffs do have and recover of the said defendant, Rufus Cheney, the sum of one thousand four hundred and forty-nine
14 dollars and fifty-five cents damages, so as aforesaid assessed by the jury, together with fifty-two dollars and seventy cents, their costs about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment-roll signed November 29th, A. D. 1870. Damages, $1,449 55; costs, 52 70—$1,502 20.

EDWARD KURTZ, *Clerk.*

Judgment-roll filed November 29, A. D. 1870, at 5 o'clock, p. m.
EDWARD KURTZ, *Clerk.*

DECEMBER 3, 1870.—Stipulation of the parties filed as follows:

Stipulation as to writ of error.

Circuit court of the United States, for the eastern district of Wisconsin.

GEORGE T. VAN ARSDALE ET ALS.
vs.
RUFUS CHENEY.

It is agreed by and between the parties hereto that the U. S. Secretary of the Treasury has directed that a writ of error be brought to the Supreme Court of the United States to procure a review of the judgment entered in the above cause in favor of the plaintiffs against the defendant. Dated Dec. 3, 1870.

CARPENTER & MURPHY,
Att'ys for Def't.
JOHN W. &. A. L. CARY,
Pl'ffs Att'ys.

DECEMBER 8, 1870.—Bill of exceptions signed and filed as follows, to wit:

Bill of exceptions.

Circuit court of the United States for the eastern district of Wisconsin.

GEORGE T. VAN ARSDALE ET AL.
vs.
15 RUFUS CHENEY.
} At law.—Nov'r 26, 1870.

This day came the parties, by their counsel, and the issue herein came on to be tried, whereupon a jury was called to try the same, and twelve free, honest, lawful men of said district, who were severally and duly sworn and empanneled and charged by the court, and at the trial of said suit on the 26th day of November, 1870, before the said court and jury, the Honorable A. G. Miller, district judge for said district, present and presiding, the following proofs and proceedings were then and there had.

It was admitted on the part of the defendant, that the taxes paid to him as collector of internal revenue for the first collection district of Wisconsin, by plaintiffs, and for the recovery of which this suit was brought, were assessed against said plaintiffs by the assessor of internal revenue for said district, upon thimble-skeins and pipe-boxes as castings, at the rate of three dollars per ton.

It was also admitted that the entries of the taxes so assessed appear upon the collector's books as they do upon the assessor's books.

The plaintiffs, to maintain said issue on their part, produced, offered, and read in evidence the deposition of Daniel B. Benedict, taken in this suit, and which deposition was as follows, to wit:

Circuit court of the United States in & for the eastern district of Wisconsin.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, & Benj. F. Aldrich
vs.
RUFUS CHENEY, LATE COLLECTOR OF INTERNAL revenue for the 1st collection district in the State of Wisconsin.
} At law.

16 EASTERN DISTRICT OF WISCONSIN, *ss:*

Before Francis Bloodgood, United States commissioner in and for said district, the deposition of Daniel B. Benedict on behalf of the plaintiffs, at the commissioner's office, Milwaukee, September 30, 1870:

Present, George W. Lakin, esq'r, of counsel for the defendant.

J. P. C. Cottrill & A. L. Cary, esquires, of counsel for the plaintiffs.

DANIEL B. BENEDICT, being duly sworn, doth depose and say as follows, to wit: I reside at Kenosha, Wisconsin. I know the plaintiffs in this suit. I knew the firm of Durant, Van Arsdale & Co., between Aug., 1866, & March, 1867, doing business in Kenosha, Wis., as foundrymen. At that time I resided at Kenosha, and my business was deputy collector of internal revenue for the 1st collection district of Wisconsin. Rufus Cheney was collector of inter. rev. for that district during

a portion of that time. I was deputy collector of inter. revenue at Kenosha during the entire time above specified, under both Cheney and Tho's J. Emmerson.

(The witness is shown five (5) receipts, which are numbered themselves No. 3, 64, 93, 124, & 157, and are hereto annexed.)

Q. Were the several sums of money mentioned in those receipts received by you, as deputy collector, of Durant, Van Arsdale & Co.?

A. They were.

Q. They are all in your handwriting, I believe, & receipted by you?

A. They are.

Q. And you had received, as deputy collector, collection lists ag'st this firm for this amount, transmitted to you by the collector?

A. I had.

Q. Did you call on this firm & demand payment of the several sums mentioned in these receipts?

A. I either called at their office or they sometimes called at my office; they generally called at my office.

17 Q. Did you require payment of these sums to be made?

A. I did.

Q. Was there any objection or protest made by this firm to the payment of these several sums; & if so, state what it was?

A. They were paid under protest.

Q. In each instance?

A. In each and every instance.

Q. Which member of the firm usually made these payments?

A. Mr. Van Arsdale usually.

Q. Did he make them all?

A. I cannot say positively whether he made them all, but he made most of them.

Q. On what ground was this protest made?

A. On the ground that he was satisfied that the internal-revenue law virtually exempted from taxation that class of goods.

Q. Upon what class of goods was it that these taxes were assessed, and which he objected to?

A. On thimble-skeins & pipe-boxes.

Q. Won't you designate from those rec'pts what is not covered on them for taxes upon thimble-skeins & pipe-boxes?

A. Rec'pt No. 93, $6 00, for manufactured iron, & in rec'pt No. 124, $5 35, for 107 doll's' worth of castings.

Q. All the rest are for these thimble-skeins & pipe-boxes, are they?

A. That is my understanding.

Q. Will you state whether you, as deputy collector, turned over all the money mentioned in these receipts to the then collector for the 1st collection district in the State of Wisconsin?

A. Yes.

Cross-exam'n:

Q. Who was the person of the firm in each instance who paid the money?

A. Mr. Van Arsdale usually paid it, and there may have been

18 an isolated instance when, during his absence, some other member of the firm paid it.

Q. You have stated that the money was paid in each instance under protest. Will you state the precise language used in each instance by the party paying the money?

A. Mr. Van Arsdale, when the law was first changed, when he came

to pay his first assessment, stated to me that he thought that it was an erroneous assessment, and that these articles were not liable to taxation; but that, as it was assessed, he supposed that he would have to pay it; but, in so doing, he wished to have it distinctly understood that it was paid under protest. This is the language used, as near as I can now remember it. At any rate, it is the substance of it.

Q. How long after that was it that he paid the tax on the assessment?

A. He paid the first tax after the change in the law—at the time he made this protest.

Q. When did he make the second payment; how long after that?

A. The next month. He paid them monthly.

Q. Did he object each time in the same terms—using the same language?

A. Perhaps not in the same language, but giving me each time to understand that he paid them under protest.

Q. Did you or he make any memorandum in writing of the objection or protest at the time?

A. I did not. I do not know whether he did or not.

Q. Did he request you to make mention on the receipt of the fact that he paid it under protest?

A. He did not, to my recollection.

Redirect exam'n:

Q. Was anything said at the time of these protests to the effect that that was all the parties could do, inasmuch as the law did not
19 allow an injunction suit to restrain the collection of the tax, or anything on that subject?

A. I don't remember anything on this subject further than I have stated.

Q. State whether you went with Mr. Van Arsdale at his request; and if so, how many times, or whether you went alone for him to the assis't assessor's, at Kenosha, to remonstrate, or anything of that kind, in reference to the levying of this tax on these thimble-skeins & pipe-boxes?

A. I do not now remember of ever going with Mr. Van Arsdale, but I do remember of going to the assessor's office, not particularly on that business, but remember of speaking to the assessor with regard to the assessment; that Durant, Van Arsdale & Co., considered them erroneously assessed.

DANIEL B. BENEDICT.

Read over to the witness & subscribed to by him before me this 30th September, 1870.

FR. BLOODGOOD,
U. S. Commissioner.

F. BLOODGOOD, *U. S. Com'r.*

No. 3.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 1ST DISTRICT OF WISCONSIN,
Kenosha, October 26, 1866.

Received of Durant, Van Arsdale, & Co. two hundred twenty $\frac{63}{100}$ dollars for excise tax on castings 73 $\frac{190}{2000}$ lbs. @ 3 00 ton..... $220 63

Total..... $220 63

being amount assessed on September list for year 1866.

DANIEL B. BENEDICT,
Deputy Collector.

$220 63.

F. BLOODGOOD, U. S. Com'r.

No. 64.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 1ST DISTRICT OF WISCONSIN,
Kenosha, October 27, 1866.

Received of Durant, Van Arsdale & Co., two hundred thirty $\frac{58}{100}$ dollars for excise tax on $76\frac{1720}{2000}$ lbs. castings, 3 00 per ton..... $230 58
Total..... $
being amount assessed on monthly list for October, 1866.

DANIEL B. BENEDICT,
$230 58. *Dep't. Collector.*

20

F. BLOODGOOD, U. S. Com'r.

No. 93.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 1ST DISTRICT OF WISCONSIN,
Kenosha, Dec. 29, 1866.

Received of Durant, Van Arsdale & Co., two hundred seventy-seven $\frac{86}{100}$ dollars for excise tax on castings, 90 $\frac{1240}{2000}$, @ 3 00..... $271 86
Manufactured iron, 120 5 %..... 6 00

Total..... $277 86
being amount assessed on monthly list for Nov., 1866.

D. B. BENEDICT,
$277 86. *Dep't. Collector.*

F. BLOODGOOD, U. S. Com'r.

No. 124.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 1ST DISTRICT OF WISCONSIN,
Kenosha, January 29, 1867.

Received of Durant, Van Arsdale & Co., two hundred two $\frac{94}{100}$ dollars for excise tax on $65\frac{1725}{2000}$ lbs. castings, 3 00 ton..... $197 59
Castings, 107 00 5 %..... $ 5 35

Total..... $202 94
being amount assessed on monthly list for December, 1866.

DANIEL B. BENEDICT,
$202 94. *Deputy Collector.*

F. BLOODGOOD, U. S. Com'r.

No. 157.] UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 1ST DISTRICT OF WISCONSIN,
Kenosha, February 26, 1867.

Received of Durant, Van Arsdale & Co., ninety-two $\frac{13}{100}$ dollars for excise tax on castings..... $92 13
Total..... $
being amount assessed on monthly list for January, 1867.

DANIEL B. BENEDICT,
$92 13. *Deputy Collector.*

And said plaintiffs, to further maintain said issue on their part, read in evidence a receipt given by Frederick J. Starin, deputy collector under said defendant, of which the following is a copy, to wit:

"UNITED STATES INTERNAL REVENUE,
"COLLECTOR'S OFFICE, 1ST DISTRICT OF WISCONSIN,
"*Milwaukee,* 1867.

21 "Received of Durant, Van Arsdale & Co., one hundred twenty-six & $\frac{04}{100}$ dollars for excise tax on—

"Cast'gs of iron $41\frac{1760}{2000}$ $3	$125 64
"M'fs " " $8 5%	40
"Total	$126 04

"being amount assessed on list for February, 1867.
"$126 04.
FRED'C J. STARIN,
"*Dep. & Act. Collector.*"

It was admitted on the part of the defendant that said defendant was collector of internal revenue for the first collection district of Wisconsin during the time that the taxes referred to in this suit were paid to him or his deputies as above shown.

And said plaintiffs, to further maintain said issue on their part, called as a witness Robert Haney, who, being first duly sworn, testified as follows:

Q. Are you acquainted with the article of thimble-skeins, and pipe-boxes?

A. Yes, sir.

Q. And have been since they have been known?

A. Yes, sir.

Q. Are you engaged in dealing in them—in selling them, as a merchant?

A. I am.

Q. Of what are thimble-skeins and pipe-boxes manufactured?

A. Pig iron.

Q. Are they ever made of steel?

A. I never knew them to be.

Q. Never heard of such an article?

A. No, sir.

Cross-examination:

Q. Is it possible to make a thimble-skein and pipe-boxes, of steel?

A. It might be possible, but it would be a rather tedious job.

Q. You think it could be made?

A. I think they might be made, but not with any such process as cast-iron.

Q. The question is whether they can be made, and not by what process?

22 A. My opinion is that there are men who could make them.

Q. Which would you rather have, a thimble-skein and pipe-box made of that kind of material, (pointing to sample on the table,) or one made of steel?

A. It would be immaterial to me, except the profit I could make on them; but I never knew of any market for them.

Q. I mean for use, and not an article of traffic. You would rather have one made of steel than one made of cast-iron.

A. I am not acquainted with the use of a steel box, and I don't know whether it would work as an iron box does or not. Sometimes it might heat, if made snugly, and would not answer.

Q. Neither would this.

A. Well, if it would swell and expand all the time, it would not do.

Q. Don't you think it would be a great deal more valuable box than this?

A. The material in it would be more valuable.

Q. And it would be no more likely to heat, would it, if made?

A. I have no practical knowledge of the use of them.

Q. What is your business?
A. Hardware.
Q. You ought to know something about steel?
A. I ought to know many things.
Q. Well, you do, don't you?
A. I know some things.
A. Is it not your opinion that that would be a more valuable thing, if used, and would last longer than any other kind of a box and pipe, and not break so readily?
A. Well, I am not acquainted with the use of them. Cast steel, in frosty, severe weather, breaks very easily, so far as my knowledge goes. It is used in many kinds of tools, but whether it would stand well
23 in a thimble-skein or not, I am not able to say. Wagons are loaded heavily in frosty weather, and possible it would not do well.
Q. You are acquainted with the different kinds, are you not?
A. Well, I have bought and sold a good many different kinds.
Q. You claim to know a little something about it?
A. Something.
Q. I ask you whether the pipe-boxes and skeins, made of the same thickness of material that the cast boxes and skein is, wouldn't it, at all seasons of the year, be a great deal stronger?
A. I told you, a few minutes ago, that I didn't know that they would be. In very cold, severe weather, I don't know as they would answer. I think the probabilities are they would break very easy when affected by frost.
Q. Did you ever hear of Gillett's pipe-box and skein for a wagon wheel?
A. I don't remember that I ever have.
Q. You never heard of any other kind of a concern than the one made of this stuff here.
A. I have been acquainted with a good many patterns of this style of box, made of cast-iron, but I never have dealt any, or bought or sold, and never have known anything about the cast-steel thimble-skein or box.
Q. Did you ever hear of one that was, in part, composed of brass?
A. Well, I have heard of boxes made of brass and Babbitt. That is copper and a mixture of metal, that has operated very well. That is, the boxes, but not the skein.
Q. What is the mechanical effect of the combination upon the axle, in that way of two different kinds of metal; one hard and the other of a softer quality. Has it not a tendency to destroy friction, and render an axle much more valuable?
A. Well, I have not confined myself particularly to that.
24 (Objected to, as immaterial.)
WITNESS: I think a combination of metals may be formed that will bear friction better than cast iron; a great deal what we call Babbitt metal is made for the purpose of bearing friction.
Q. Did you ever hear of a wrought-iron axle on a wagon or carriage?
A. Very frequently. It is very common.
Q. Frequently on carriages, are they not?
A. Yes, sir.
Q. The whole axle is iron, frequently, is it not?
A. Yes, sir.
Q. Is it not sometimes steel, also?
A. Well, there might be steel, but I never bought one, or owned one.

Q. Have you never heard of that thing?

A. Well, if I ever have, I never attached enough importance to it to remember it; I think likely there may be steel axles.

Q. Is it not notorious that there are a great many of those fine stylish carriages?

A. There may be, but I never traded in them.

And said plaintiffs, to further maintain said issue on their part, called as a witness—

GEORGE T. VAN ARSDALE, who, being sworn, testified as follows:

Q. How long have you been engaged in the manufacture of thimble-skeins and pipe-boxes?

A. A little over six years.

Q. Are you well acquainted with the manufacturing of them, and their sale in the United States?

A. Yes, sir; and I have been for sixteen years. I used them for ten years before I commenced manufacturing them.

Q. Of what material are they made?

A. All iron.

Q. Is there any such manufactory in the United States, and has there ever been a thimble-skein and pipe-box made of steel?

25 A. I never have heard of one, sir. I once heard that there was a party in Ohio attempting it, but I inquired, and found that the information given me was false—that there was no one attempting it.

Q. Could they be made of steel without an expenditure entirely beyond the use of the article?

(Objected to.)

Q. They never have been made?

A. Not that I know of.

Q. Is a thimble-skein and pipe-box made of iron? How long has it been known as an article of trade or manufacture or commerce in this country?

A. I don't know; some four or five years ago I attempted to get the history of the thing, but I could not trace it back to only about eighteen or twenty years. That is the longest I can trace it back. It might have been made before that. I attempted to write the history of thimble-skeins, and sought all the information east and west I could get, but I found they had been known a little longer than that.

Q. Have they uniformly been manufactured of iron?

A. Yes, sir; with the exception, as I stated yesterday, that I had once seen a brass box; and there is a thimble-skein mentioned. I don't know that I never heard of one being made. A party got out a patent and gave me the contract to make them for the entire west—from Lake Michigan west. That was composed of two parts, cast-iron and brass, in the skeins, but I never made them.

Q. Are they an article that for the last ten or fifteen years, have been extensively used?

A. Yes, sir.

Q. And are generally used in the West in the manufacture of wagons?

A. Yes, sir; and they are now introduced in the East largely.

JUROR: What heft is the lightest one?

A. The lightest one we make weighs thirty-two pounds to the set of four. That is the skeins and boxes all together. I don't know

26 of any lighter—two inches in diameter and six inches long—the boxes.

CARY: What is the cost of a set of thimble-skeins and pipe-boxes, complete?

A. The cost I gave you yesterday. That is the size I always figure on in selling or manufacturing. In figuring my expenses of manufacturing, I always take that size of skeins as the average; and that costs four dollars and sixteen cents. That was what it cost then. But it costs less to-day. Iron is cheaper to-day, and I pay less for labor.

Q. What part of the cost is turning the knob and cutting the screw in the nut and on the knob?

A. Eleven cents, out of the four dollars and sixteen cents.

Q. The cost of the casting is four dollars and five cents.

A. Yes, sir.

Q. Were you ever assessed under any list of manufacturers' taxes on thimble-skeins and pipe-boxes?

(Objected to.)

Q. Is any part of this assessment of this tax, a tax for manufacturing?

A. No, sir.

Q. What was the whole of this tax assessed for?

A. For the casting That is, we were assessed on the thimble-skeins and pipe-boxes, as castings, three dollars per ton. We paid part of the time three dollars and sixty cents per ton, but I don't know whether under this law or under the previous law. I think under this law it was only three dollars.

Cross-examination:

Q. Did you ever hear of Gillett's patent for thimble-skeins and pipe-box?

A. That is the one I had reference to when I spoke about the brass.

Q. How is that constructed?

A. I have the contract, and had the patent paper, I believe, and gave them up a short time ago. His theory of constructing them was
27 this: He in the first place made an axle brass bar, a brass ring for the skein of that size, two and one-half inches wide. His intention was to settle them into the mold, after the mold was made, and pour the iron in, and that the iron would attach itself so to that brass, that the brass would become firmly with the iron, and experience taught him that it would not do. If you made the brass thick it was cumbersome, and if you made the brass thin'er, it would melt the brass. During the six months I had the contract, I received an order for one set of skeins, from a party whom he had victimized in Illinois. But I wrote back to him it would cost a thousand dollars to fit up the proper appliances, and I thought I would not do it.

Q. What is the mechanical effect of having these brass rings in it?

A. It makes the brass useless, for this reason: Mr. Gillett started out with this idea that, because we used a Babbitt, or brass, or some other material on a line of shafting running through the building, to take off the friction, therefore he would get up a better thing for a skein. He forgot the fact which experience has since taught him, that the moment a foreign substance comes in, it cuts the brass right out. We exclude dirt from the shafting, but we cannot from the skein.

Q. You never heard of a thimble-skein or pipe-box except of this cast-iron?

A. Only with the exception I have mentioned.

Q. Did you ever hear of a carriage *of* a wrought iron *cast* axle?
A. Yes, sir; but that is not a pipe-box. That pipe-box was cast-iron.
Q. What was the skeins?
A. There was no skeins about it. The skein is a hollow casting.
Q. It performed the office of a skein, didn't it?
28 A. Yes, sir.
Q. Then you have heard of that?
A. Yes, sir.
Q. Did you ever hear of anything else performing the office of a skein?
A. Yes, sir. I have made it of steel. I have made an axletree of steel, but not a box.
Q. What did you make the boxes of?
A. Not of anything. I bought it, made of cast-iron.
Q. Then you have heard of this thing being made of steel?
A. No, sir; never.
Q. You have heard of a thing performing the office of a skein being made of steel?
A. Yes, sir.
Q. Did you ever hear of a box being made of steel?
A. I never have.
Q. Or of anything except cast-iron?
A. Brass, as I stated.
Q. What sort of a nut was on that steel axle?
A. A cast-iron nut.
Q. Who paid the taxes you have sued to recover back here?
A. Our books show that I paid them in every instance except one. But I cannot tell independent of them, with the exception of the first. This was four years ago, and I have got too much business to carry everything of that kind in mind. The books show it—that the checks were made in my handwriting, and the entries on the cash books. Understand me: I don't take the fact of writing the checks alone as evidence that I paid the moneys, because $\frac{99}{100}$ of all our checks was written by me. No money is paid in our firm but by my order, not even ten dollars. And when an entry was made on the cash book by me, I am willing to swear that I made that payment; and I found that all those payments were made by me except one, and that was made
29 by Mr. Durant.
Q. What did you say each time, in substance, to the officer?
A. The first payment was the only time. At that time I had got an impression that a protest was necessary, and therefore I told him, distinctly, I wished him to understand that I was protesting against the payment of the taxes, and my reason was this: Up to that time we had paid the tax, and supposed it to be legally assessed, and believed we must pay it, and when that law came out, my own impression was that we didn't have to pay the taxes under it. I took some trouble and expense to ascertain what the opinions of other manufacturers were, and with a single exception, they came to the conclusion that I did right. To be safe, I formally told the collector that I wished him to understand distinctly, that I protested against the payment of that tax, and that is the only time, I think. I think that is the only time I spoke in that way, but I have talked with him.
Q. When was this conversation, when you made the protest?
A. The 27th of September, 1866.
Q. Did you not testify yesterday in the case tried here between yourself and others against Erskine, is substance that you did not learn

where to protest, or that the protest was necessary, until some time about the month of June, 1867.

A. I never testified so, sir, at all. I never gave any such testimony. If I did, then I didn't know what I said.

Q. Did you not testify on that trial, that you didn't know that any protest was necessary, until about the time you commenced that suit?

A. No, sir; I didn't testify to that, sir. I testified that I didn't know that the protest was necessary; but never after the suit had commenced.

Q. Up to what time do you say you didn't know it was necessary?

30 A. At the time that that case that we had on then was under consideration; and now I am talking about five months previous to that.

Q. When was that?

A. That was in June, 1867. Now we are talking about September, 1866.

Q. Now, if you didn't know until June, 1867, that a protest was necessary, how is it that you are now able to say that you knew it was necessary, and made a formal protest away back in 1866?

A. I have not said that I considered a formal protest necessary, but I made one at the time I paid those taxes. I had seen a synopsis of the law in the paper, but not half the full text of the law. I took it for granted that I must make a protest. When I got the full text of the law, then I found I had three things to do: to pay the tax—that was compulsory; and the next, to appeal, which I did, and then to sue the Government. When I got the text of the law, then I paid no further attention to it.

Q. Don't you know that the former law required no appeal at all?

A. No, sir; I didn't know it. I know this, that under that law I must apply to the Commissioner; because I did apply, and supposed that was necessary, and I gave Mr. Cary the answer to that appeal, and I suppose he has got it.

Redirect examination:

Q. In regard to this matter of steel axle, that only performs one of the functions of this thimble-skein?

A. Yes, sir; that is all—it performs more than that—this does.

Q. But it does not provide for the thimble part of this?

A. No, sir; it performs more than this does.

Q. Is that the letter which you received from the Commissioner in answer to your appeal to him?

A. Yes, sir; that is the answer. I applied under this law, and

31 that was under the law of 1867.

CAREY: I offer that letter in evidence, dated August 15th, 1866.

(Objected to. Objection sustained.)

Q. Is that the same form of notice that was served upon you?

A. Yes, sir.

The form of notice here shown witness was offered and read in evidence as follows, to wit:

"*Monthly notice.*

"OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
"DISTRICT, STATE OF WISCONSIN,
"*Milwaukee,* , 18 .

"List. ———
"Div. ———

"M . DURANT, VAN ARSDALE & CO.:

"The tax assessed against you for the month of 18 , amounting to $, is due and payable on or before the last day of , and unless paid within that time it will become my duty to collect the same with a penalty of five per centum additional, and interest at one per centum per month. "RUFUS CHEENY, *Collector.*

"Bring this notice with you."

It was admitted on the part of the defendant that before this suit was brought, the plaintiffs appeal from the assessment and collection of the taxes involved in this suit to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof; and as evidence of the decision of said Commissioner upon said appeal, the plaintiffs produced and read in evidence two letters from the Commissioner of Internal Revenue, one to Durant, Van Arsdale & Co., and one to George Q. Erksine, collector of internal revenue for the first collection district of Wisconsin, which letters were as follows, to wit:

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"*Washington, Apr.* 29, 1870.

"SIR: Your claim for the refunding of 4,150 $\frac{91}{100}$ dollars, has
32 been rejected. This office will give the collector of your district the reasons in full for the rejection of the same.

"Very respectfully.

"C. DELANO, *Commissioner.*

"Messrs. DURANT, VAN ARSDALE & CO.,
"*Kenosha, Wisc.*"

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"*Washington, April* 28, 1870.

"SIR: The refunding claim of Durant, Van Arsdale & Co., for $4,150 91, is rejected for the reason that the thimble-skeins and pipe-boxes assessed in this case, were clearly subject to the tax imposed and paid, as they were not made of steel. It is asserted that none are made of steel. If such be the fact, then none are exempt by the act of July, 13, 1866.

"I especially would direct you that in case any suit is brought against you, or any other officer, for the recovery of this tax, you give me immediate notice of the fact, and enclose the same in the envelope sent under this cover, that it may be brought to my personal attention.

"Respectfully.

"C. DELANO, *Commissioner.*

"GEORGE R. ERSKINE, Esq.,
"*U. S. Coll.* 1 *Dis., Milwaukee, Wisconsin.*"

Plaintiffs rest.
Defendant rests.

And thereupon the court charged the jury as follows, to wit:

Judge's charge to the jury.

GENTLEMEN OF THE JURY: The act of Congress approved July 12th, 1866, on pages 149 & 150, 15th Statutes, exempts from taxation thimble-skeins and pipe-boxes, whether made of steel or iron, cast or wrought, and no taxation on them could be lawfully assessed.

33 The internal revenue laws having prohibited suits on the part of taxed citizens to restrain the collection of a tax illegally assessed, an illegal tax paid under notice of the collector to pay or be subject to a penalty, an action may be maintained against the collector, on the part of such persons so paying, to recover the tax so paid.

In order to maintain such action, it is not necessary that a formal protest, in writing or otherwise, should be made against each payment of a tax of the same nature.

If the collecting officer had notice that the tax was claimed by the person to be illegal, and the person so paying objected to the payment of the tax, an action may be maintained.

(Defendant's counsel excepts to each and every part of the judge's charge to the jury, separately and severally, as is given.)

The defendant also asked the court then and there to give the following instruction to the jury, to wit:

1. That at the time of the payment of the taxes, to recover which this action is brought, thimble-skeins & pipe-boxes, made of steel, were exempt from tax under the internal revenue laws; but the same articles, made of iron, were not then exempt from tax. If you find, from the evidence, therefore that the skeins and pipe-boxes, upon which the tax was assessed and paid in this case, were made of iron, then the same was liable to taxation, & you must find for the defendant.

2. The plaintiffs, in order to maintain this action, must have protested to the collector or deputy collector at the time of making each payment of the tax assessed, and they can only recover, in this case, for the amount of tax paid, and as to which a protest was then made by the plaintiffs to the collector; which said instructions were then and there severally refused by said court; to which ruling and refusal

34 of the court, the defendant then and there separately and severally excepted.

And inasmuch as the said several matters so produced and given in evidence on the part of the said defendant, and by his counsel aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the defendant, did then & there propose their aforesaid exceptions to the aforesaid charge and instructions of the said court, and requested said judge to put his seal to this bill of exceptions containing the said several matters so produced and given in evidence on the part of the defendant as aforesaid, according to the form of the statute in such case made and provided, and to the rules and practice of the said circuit court; and thereupon, the said judge, at the request of the said counsel for the said defendant, did put his seal to this bill of exceptions pursuant to the aforesaid statute, rules, and practice, on the 8th day of December, one thousand eight hundred and seventy.

A. G. MILLER. [SEAL.]

Whereupon a writ of error and citation issued, and a copy of said writ of error lodged for defendants in error.

35 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full & complete copy of the record & proceedings in the case of George T. Van Arsdale et al. vs. Rufus Cheney, late collector int. rev. 1st dist., Wis., as a return to the writ of error hereto annexed.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said eastern district of Wisconsin, this twenty-ninth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the said United States, the ninety-fifth.

[SEAL.] EDWARD KURTZ, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America, for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between George T. Van Arsdale, Alvin F. Durant, & Benjamin F. Aldrich, plaintiffs, and Rufus Cheney, late collector int. rev. 1st dist., Wis., defendant, a manifest error hath happened to the great damage of the said Rufus Cheney, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this eighth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

EDWARD KURTZ,
Clerk U. S. Circuit Court, East. Dist., Wis.

(Indorsed:) Filed December 8, 1870. Edward Kurtz, clerk.

37 [SEAL.] The United States of America to George T. Van Arsdale, Alvin F. Durant, & Benjamin F. Aldrich, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to writ of error filed in the clerk's office of the circuit court of the United States of America, for the east-

ern district of Wisconsin, wherein Rufus Cheney, late collector of internal revenue for the first collection district in the State of Wisconsin, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of *writ of* error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

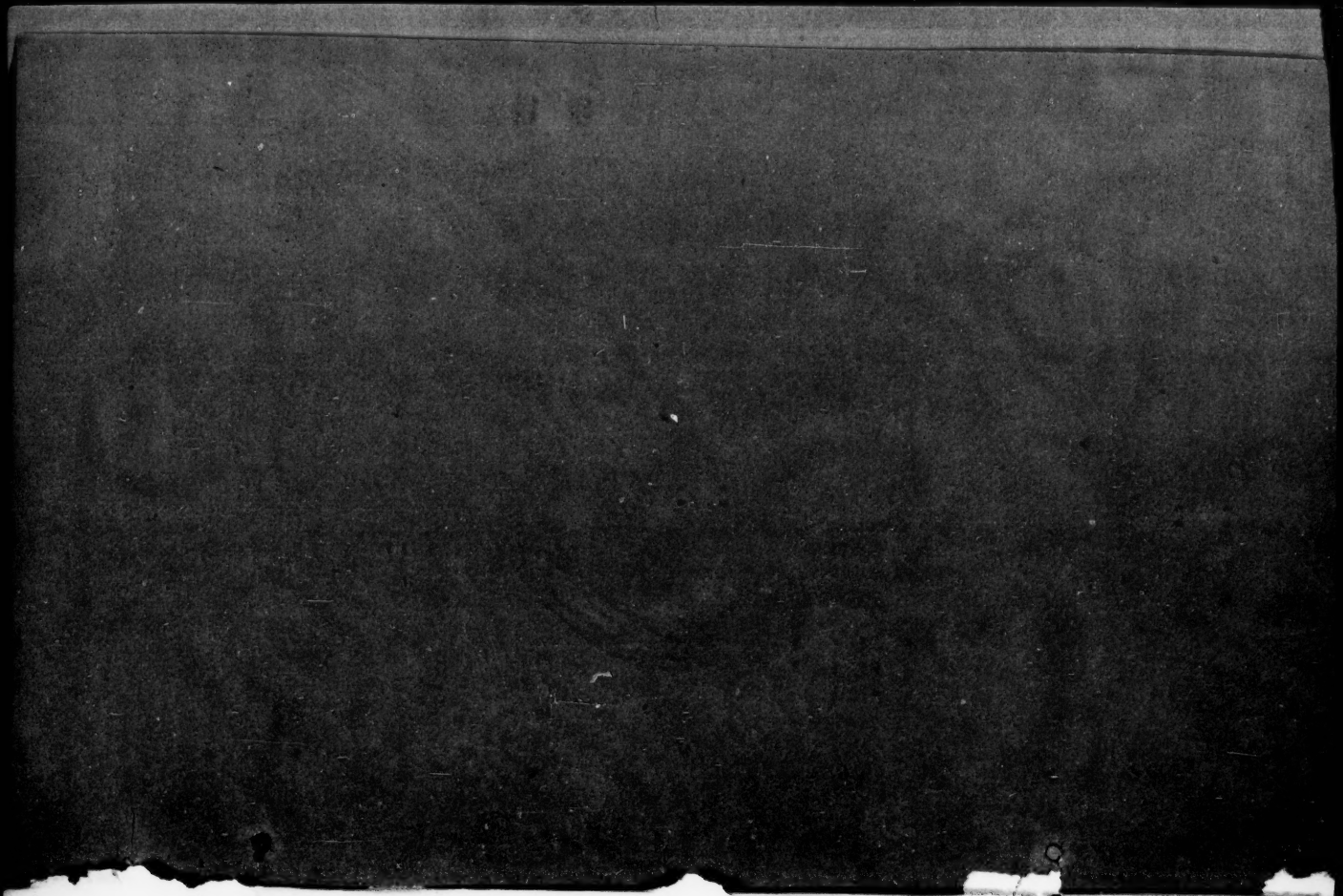
Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this eighth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

A. G. MILLER,
District Judge.

We accept service of above citation this 9th day of December, A. D. 1870.

JOHN W. & A. L. CARY,
Pl'ff's Att'ys.

(Indorsement on cover:) No. 458. Rufus Cheney, late collector of internal revenue, plaintiff in error, vs. George T. Van Arsdale, Alvin F. Durant, and Benjamin F. Aldrich. E. Wisconsin C. C. U. S. Filed 4th January, 1871.



In the Supreme Court of the United States.

DECEMBER TERM, 1871.

RUFUS CHENEY, *late Collector of Internal Revenue for the First Collection District in the State of Wisconsin, Plaintiff in Error,*

vs.

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, AND BENJAMIN F. ALDRICH.

No. 242.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

RUFUS CHENEY, *late Collector of Internal Revenue for the First Collection District in the State of Wisconsin, Plaintiff in Error,*
vs.
GEORGE T. VAN ARSDALE, ALVIN F. DURANT, AND BENJAMIN F. ALDRICH.
} No. 242.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

This case is similar to the one next preceding it on the docket, (No. 241.)

The action was brought by the defendants in error against the plaintiff in error to recover back certain internal revenue duties, amounting to $1,138 43, alleged to have been illegally assessed on cast-iron thimble-skeins and pipe-boxes manufactured by the former between September 1, 1866, and March 1, 1867, and paid under protest. The jury gave a verdict in favor of the plaintiffs, for whom judgment was rendered for 1,449 55 and costs on November 29, 1870. Defendant took a bill of exceptions.

Counsel contend that the court below erred in instructing the jury that "the act of Congress approved July 12, 1866, on pages 149 and 150, 14th Statutes, ex-

empts from taxation thimble-skeins and pipe-boxes, whether made of steel or iron, cast or wrought, and no taxation on them could be lawfully assessed." (See Record, p. 22.) And for grounds of error, reference is made to remarks under "first error" in the brief for plaintiff in error in case No. 141. In addition thereto it is to be observed that the provision alluded to by the court exempts thimble-skeins and pipe-boxes made of *steel*, but not such as are made of iron. That provision reads: "Steel, made from iron advanced beyond muck bar, blooms, slabs, or loops in ingots, * * * * thimble-skeins and pipe-boxes, and springs, tire and axles made of steel used exclusively for vehicles," &c. The words of description here used, viz: "made of steel," &c., would seem to apply to springs and to thimble-skeins and pipe-boxes, as well as to tire and axles.

It is further contended that the court erred in refusing the second instruction asked by the defendant, viz: that the plaintiffs, in order to maintain their action, must have protested at the time of making each payment of the tax assessed, and that they could only recover for the amount of any payment as to which protest was so made. (See Record, p. 22.) Upon this point, reference is also made to remarks in brief for plaintiff in error, in case No. 141, under "second error."

GEO. H. WILLIAMS,
Attorney General.

C. H. HILL,
Assistant Attorney General.

Supreme Court, United States.

No. 242, December Term, 1871.

RUFUS CHENEY, late Collector, &c., Plaintiff in Error.

vs.

GEORGE T. VANARSDALE, et al., Defendants in Error.

No. 241, December Term, 1871.

GEORGE Q. ERSKINE, Collector, &c., Plaintiff in Error.

vs.

GEORGE T. VANARSDALE, et al., Defendants in Error.

Brief and Points of Defendants in Error.

JOHN W. CARY,
For Defendants in Error.

Milwaukee News Company, Printers.

Supreme Court, United States.

RUFUS CHENEY, late collector of Internal Revenue for the first collection district, in the state of Wisconsin, Plaintiff in error.

against

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, and BENJAMIN F. ALDRICH, Defendants in error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 242, December Term, 1871.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF CASE.

Defendants in error were co-partners under the name and style of "Durant, Van Arsdale & Co.," and as such, engaged in the business of manufacturing thimble skeins and pipe boxes from cast iron, for wagons, at the city of Kenosha, in the state of Wisconsin, said city being in the first collection district of internal revenue of said state.

That from the first day of September, 1866, to the first day of March, 1867, said firm manufactured and sold $379\frac{3}{2000}$ tons of cast iron thimble skeins and pipe boxes, and that the assessor of internal revenue for said district, from month to month during the time above named assessed against said defendants in error upon said thimble skeins and pipe boxes *as castings*, a pretended tax of three dollars for each and every ton, which

said tax amounted in the aggregate to the sum of one thousand one hundred and thirty-eight dollars and forty-three cents. (See record pages 6 and 11.)

That defendants in error from time to time paid to plaintiff in error, as collector of internal revenue, the said tax of one thousand one hundred and thirty eight dollars and forty-three cents. (For the date and amount of different payments, see the receipts on pages 13, 14 and 15 of record.)

That at the time of such payments, plaintiff in error was collector of internal revenue for the first collection district of the state of Wisconsin. (See record, page 15.)

All of said payments were made under protest. (See deposition of Daniel B. Benedict, pages 11 and 12 of record, and testimony of George T. Van Arsdale, page 19 of record.)

Plaintiff in error as such collector, required defendants in error to make such payments by serving upon them before each payment a notice that the tax assessed against them would be due and payable on or before a certain day, and that unless paid within the time named it would become his duty to collect the same with a penalty of five per centum additional and interest at one per centum per month. (See record, page 21.)

Thimble skeins and pipe boxes were never made of steel. (See testimony of Robert Haney, page 15 of record, and testimony of George T. Van Arsdale, page 17 of record.)

The taxes in question were assessed against defendants in error upon the thimble skeins and pipe boxes manufactured and sold by them *as castings* and not as a manufactured article. (See admission on page 11 of record and Van Arsdale's testimony, page 18 of record.)

Prior to the commencement of this suit, said defendants in error appealed from the assessment and collection of the taxes in question to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof,

and said Commissioner entertained said appeal and decided the same adversely to said defendants in error. Said appeal was taken July 14, 1869; was decided by Commissioner April 28, 1870, and this suit was commenced June 24, 1870. (See record, page 21.)

This suit was brought in the Circuit Court, for Milwaukee County, State of Wisconsin, to recover from the plaintiff in error the amount of taxes so paid him by the defendants in error, upon the ground that the thimble skeins and pipe boxes upon which said taxes were assessed were exempt from internal revenue tax.

Plaintiff in error afterwards removed the suit to the Circuit Court of the United States for the Eastern District of Wisconsin, where the same came on to be tried by the court and a jury, on the 26th day of November, 1870, and the jury returned a verdict for the defendants in error and assessed their damages at the sum of one thousand four hundred and forty-nine dollars and fifty-five cents.

The court charged the jury, as follows:

"GENTLEMEN OF THE JURY: "The act of Congress approved July 12th, 1866, on pages 149 and 150, 15th statutes, exempts from taxation thimble skeins and pipe boxes, whether made of steel or iron, cast or wrought, and no taxation of them could be lawfully assessed.

"The internal revenue laws having prohibited suits on the part of taxed citizens to restrain the collection of a tax illegally assessed, an illegal tax paid under notice of the collector to pay or be subject to a penalty, an action may be maintained against the collector, on the part of such persons so paying to recover the tax so paid.

"In order to maintain such action it is not necessary that a formal protest in writing or otherwise, should be made against each payment of a tax of the same nature.

"If the collecting officer had notice that the tax was claimed by the person to be illegal, and the person so paying objected

to the payment of the tax, an action may be maintained." (See record, p. 22.)

The exception to said charge by plaintiff in error, was in the following form :

"Defendant's counsel excepts to each and every part of the judge's charge to the jury, separately and severally, as is given." (See record, p. 22.)

Plaintiff in error requested the court to instruct the jury, as follows, to wit :

1. "That at the time of the payment of the taxes, to recover which this action is brought, thimble skeins and pipe boxes made of steel, were exempt from tax under the internal revenue laws; but the same articles made of iron, were not then exempt from tax. If you find from the evidence, therefore, that the skeins and pipe boxes upon which the tax was assessed and paid in this case, were made of iron, then the same was liable to taxation, and you must find for the defendant.

2. "The plaintiffs in order to maintain this action, must have protested to the collector or deputy collector at the time of making each payment of the tax assessed, and they can only recover in this case for the amount of tax paid, and as to which a protest was then made by the plaintiffs to the collector."

The court refused to give the instructions requested, and plaintiff in error excepted. (See record, p. 22.)

The judgment of the court below, should be affirmed.

Point I.

The thimble skeins and pipe boxes upon which the taxes in question were assessed, were exempt from taxation under the internal revenue laws, and hence, were not subject to the taxes imposed, or any tax to the United States.

We will first give the statute under which the assessor claimed to make the assessment, and then the statute under which we claim the exemption.

The statute under which the assessment was made is a part of section 9, of chapter 184, of the acts passed at the first session of the 39th Congress, approved July 13th, 1866, and the particular clause of the section to which reference is made, is found on page 131, of 14th Statutes at Large, and, is as follows:

"On stoves and hollow ware in all conditions, whether rough, tinned or enameled, *and castings of iron*, not otherwise provided for, a tax of three dollars per ton."

The assessment made was upon the thimble skeins and pipe boxes, *as castings of iron*, at the rate of three dollars per ton.

The exemption statute is section 10 of Chapter 184, above cited. This section is found on page 147 of 14th Statutes at Large and is as follows:

"Sec. 10. And be it further enacted. That from and after the passage of this act, the articles and products hereinafter enumerated, shall be exempt from internal tax."

(Here follows a long list of articles and at the foot of page 149 of same Statutes we find the following:)

"Steel, made from iron advanced beyond muck bar, blooms, slabs, or loops in ingots, bars, rails made and fitted for railroads, sheet, plate, coil, or wire, hoop-skirt wire covered or uncovered; car wheels, THIMBLE SKEINS AND PIPE BOXES, and springs, tire and axles made of steel, used exclusively for vehicles, cars or locomotives; and clock springs, faces and hands."

This statute went into effect July 13, 1866.

We contend that this exemption applies to thimble skeins and pipe boxes, whether made of steel, iron, or any other material; while the government claims that it applies only to those made of steel.

To sustain the construction given by the government the word "steel" at the beginning of the clause must necessarily operate upon and qualify every article specified in the clause. Does it? We think not. First, observe the punctuation, after the word "uncovered," there is a semi-colon, and then follows, "car

wheels, thimble skeins and pipe boxes," articles that are never made of steel, (the evidence in this case is *that thimble skeins and pipe boxes are never made of steel*, and as a matter of fact car wheels were not made of steel until the year 1868, and then only in limited quantities as an experiment—the experiment proved a failure,) and then comes the following: "and springs, tire and axles *made of steel*." Now if the intention was to have the word "steel" at the beginning of the clause qualify every article named in the clause, why did Congress deem it necessary to again use the word "steel" so as to say that only "springs, tire and axles *made of steel*" should be exempt. Is not this the explanation—that having exempted car wheels, thimble skeins and pipe boxes, articles never made of steel, and which were to be exempt without reference to the material of which they were made, that they deemed it necessary to subsequently use the word "steel" so as to confine the exemption of certain articles afterwards named to such only as should be made of steel.

Again, it must be presumed that Congress in exempting thimble skeins and pipe boxes, intended to exempt something which had an existence and was liable to taxation; otherwise, why the necessity of the exemption? It was proved upon the trial and is a fact beyond question that these articles were never made of steel, but of iron; then must we not necessarily come to the conclusion that it was the intention to exempt thimble skeins and pipe boxes made of iron?

The suit of C. B. Brown, and others vs. O. L. Mann, collector of internal revenue, &c., brought in the Circuit Court of the United States for the Northern District of Illinois, to recover taxes assessed and paid upon thimble skeins and pipe boxes as castings, the exemption being claimed under the above statute, was tried before His Honor, Judge Drummond, in April, 1869. and he gave the following decision, which we beg leave to produce here at length.

"In this case Brown and others against Mann, I think the plaintiffs are entitled to recover judgment; the question is whether by the terms "thimble skeins and pipe boxes" it was the intention to exempt from taxation the articles upon which this tax was imposed and payment made under the act of July, 1866.

"That act provided that from and after its passage the articles and products herein after enumerated shall be exempt from internal tax, and it then proceeds to set forth in alphabetical order the various articles that were to be exempt from tax.

"The particular clause under which the question in this case arises is this: Steel made from iron advanced beyond muck bar." &c., and including among other things thimble skeins and pipe boxes,and springs, tires and axles made of steel and exclusively for vehicles "

"Now it is claimed that the necessary construction of this is to exempt from taxation thimble skeins made of steel and that inasmuch as by a subsequent law thimble skeins made of cast iron were exempt; the necessary construction of this law is that only thimble skeins made of steel were intended to be exempt from taxation.

"The language is not so clear and distinct as it might have been, and if it intended to include only articles made of steel it would seem to follow as a necessary consequence that the term 'steel' should not be used at all in the clause after the initial word had been mentioned, 'steel, made from iron,' &c.

"But, in point of fact, the word 'steel' is afterwards used, as for example, springs, tires and axles, made of steel.

"What is the object of using the words 'made of steel' if upon every word in the clause steel is to be the qualification, as if written, thus—steel made of muck bar, blooms of steel, slabs or loops in ingots of steel, bars of steel, &c.

"Now the proof in this case is that thimble skeins never are made of steel. The whole evidence introduced shows that not

a single witness ever heard of a thimble skein made of steel. Then the question arises whether it was the intention of Congress to exempt an article never heard of, and never known.

"They certainly intended to exempt something from taxation by the words 'thimble skeins.' Did they intend to exempt an article that never had an existence in the world, namely—thimble skeins 'made of steel.'?

"That would hardly be a natural conclusion in the case supposed from the language used, unless it was not susceptible of any other construction.

"If for example, it had said thimble skeins made of steel, then, although it appeared that there was never such a thing made, still we might say that Congress intended to exempt an article that it supposed was made, and consequently had legislated upon a subject without being sufficiently familiar with it. But inasmuch as we can apply the words to an article used in the trade as a matter of merchandise, and as the word "steel" does not, and may not necessarily qualifiy every single word used in that clause, I think we must have to suppose that by the use of the word thimble skeins, congress intended it should apply to some article that was well known as an article of merchandise, and therefore, that it intended to exempt not merely an imaginary thing.

"As I have said, if this language could not be construed in any other way, if it was not possible to place any other construction upon it, then consistently with the evidence we should have to say that Congress meant to exempt an article that was never yet made, and legislated upon the probability that it might be made, or under a misapprehension of the facts.

"But that not being so, I think that the only conclusion we can arrive at is, that Congress intended to exempt what was then an article of merchandise, and as the only article of merchandise was a thimble skein made of cast iron, that they intended to exempt that article.

"To be sure it may be said why exempt the following year 'thimble skeins made of cast iron.' Well, it would be easy to ask questions about a good deal of the legislation of congress in relation to internal revenue, and it would be very difficult to answer some of them. It is possible that they may have legislated on the presumption that they were not yet exempt. I cannot tell how that may be, I am not bound to answer that question why it was, they so legislated.

"On the whole I think that giving the best construction that I can to this clause, the conclusion is that the thimble skeins named here and proved to have existed, were exempt from taxation.

"Therefore, the plaintiffs are entitled to recover."

Point II.

The thimble skeins and pipe boxes in question were not subject to a tax as a manufactured article, as distinguished from the tax sought be imposed upon them as castings, and hence the exemption statute above quoted could not have been intended as an exemption from a manufacturer's tax, but only as an exemption from the tax imposed upon them as castings, which was the only tax to which they would have been subject had the exemption statute not been enacted.

To make this point clear—It was claimed by the plaintiff in error in the court below that thimble skeins and pipe boxes before being fully completed and finished as an article of merchandise went through a certain manufacturing process which advanced them beyond the condition of castings, that they were therefore subject to a manufacturer's tax in addition to the tax upon them as castings, and that the exemption only applied to the manufacturer's and not to the other tax.

Our first answer to this proposition is the point above stated, to wit: that they were not subject to a manufacturer's tax. Nothing was done to the pipe box after it was cast to fit it for use except to clean off the sand.

Upon one end of the thimble skein there is a knob which has to be turned off and a thread cut thereon, and a thread also has to be cut in a cast iron nut which screws on to this knob. The cost of the thimble skein, and pipe box as castings per set is four dollars and five cents, and the cost of turning the knob, cutting the thread thereon, and cutting the thread in the nut per set is eleven cents. (See testimony of Van Arsdale, record, page 18.)

Now we call attention to the latter part of section 96 of chapter 173 of the acts passed at the first session of 38th Congress found on page 272 of 13th, Statutes at Large, which is as follows:

"And also all goods, wares, and merchandise and articles made or manufactured from materials which have been subject to and upon which internal duties have been actually paid, or materials imported upon which duties have been paid, or upon which no duties have been imposed by law, where the increased value of such goods, wares, or merchandise and articles so made or manufactured, shall not exceed the amount of five per centum ad valorem, shall be, and hereby are exempt from duty."

It is evident from the cost of these articles as castings, and the cost of the manufacturing process upon them after they were cast, that their value was not increased five per centum ad valorem by reason of the manufacturing process, and hence they were not subject to tax as a manufactured article.

Our second answer to the proposition is, that the statute exempting thimble skeins and pipe boxes exempts them from any internal tax, whether it be a tax imposed upon them as castings or as a manufactured article. It exempts them from all taxes. The language is "shall be exempt from internal tax."

POINT III.

The taxes in question were paid by the defendants in error to plaintiff in error under protest. (See deposition of D. B. Benedict, page 12 of record, and testimony of G. T. Van Arsdale, pages 19 and 20 of record.)

In this connection we wish to suggest that it was not necessary for the defendants in error to protest or object to payment of these taxes at the time of making payment in order to maintain an action to recover them back.

1st. The payments were not voluntary, but were compulsory in pursuance of the provisions of section 28 of Chapter 173, of the acts passed at the first session of the 38th Congress found on page 232 of 13th Statutes at Large, as amended by Sec. 8, Ch. 169, Statutes at Large. The plaintiff in error, as collector served upon the defendants in error before each payment notice that the tax would be due and payable at a certain time and that unless paid within the time named it would be his duty to collect the same with the addition of a certain penalty and interest. (See record, page 20.)

Here was a threat to add a penalty and interest, coupled with the power to collect by distraint and sale of property, and the defendants to relieve themselves from the penalty made payment. Payment made under such circumstances must be considered compulsory and not a voluntary one. Hence the rule laid down in Elliott vs. Swartout, 10 Peters, 137, as to voluntary payments does not apply.

2d. The act of 1866—14th Statutes at Large, 111, authorizes the commissioner to repay to collectors such sums of money as may be recovered against them in any court, for any internal taxes collected by them with costs and expenses of suit, &c. This statute with others relating to internal revenue makes a recovery against the collector in the nature of a recovery against the United States. So says this court in Philadelphia vs. Collector, 5 Wallace, 720. (See page 733.)

Such being the case, a protest is not necessary to put the collector on his guard, so that he may protect himself; the recovery is virtually against the government, therefore, the rule laid down in Elliott vs. Swartout, *supra*, as to the necessity of a protest where payment is made to an agent has no application here. Then what office does a protest serve in cases like this? None whatever in our judgment.

3d. There is no statute requiring internal revenue taxes illegally or erroneously assessed or collected, to be paid under protest in order that they may be recovered back, but there is such a statute relating to custom duties, enacted in 1845. (See Brightley's Digest, page 392, section 315, or 5 Statutes at Large, 727.) Therefore it cannot be claimed that a protest is necessary by reasons of any statutory provision.

Point IV.

Defendants in error complied with the provisions of section 19, *Chapter* 184, 14 *Statutes at Large*, 152, *by taking an appeal to the Commissioner of Internal Revenue prior to bringing the action, and commencing the action within six months after an adverse decision by the commissioner.* (As to appeal and decision, see record, page 21, and as to time suit was commenced, see record, pages 4 and 5.)

To the effect that this suit was properly brought and removed from the state to the federal court, and that the court below had jurisdiction we cite the following cases:

Philadelphia vs. Collector, 5 Wal. 1720.

Collector vs. Hubbard, 12 Wal. 1.

Proctor

Proceedings Courts of Claims 231. 244

31 Howe 294

Supreme Court, United States.

GEORGE Q. ERSKINE, Collector of Internal Revenue, &c., Plaintiff in error.

against

GEORGE T. VAN ARSDALE, ALVIN F. DURANT, and BENJAMIN F. ALDRICH, Defendants in error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 241, December Term, 1871.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF CASE.

It will be observed that the defendants in error in this case are the same as in the preceding case of Cheney, plaintiff in error. The two cases are of the same nature this suit having been brought to recover the taxes assessed and paid upon the thimble skeins and pipe boxes (as castings) manufactured and sold by the defendants in error from March 1, 1867, to April 1, 1868.

It will not be necssary for us to make a lengthy statement of this case as it is very like the Cheney case, but we will briefly refer to parts of the record.

For the assessments, see the testimony of O. C. Mason, record, pp. 21 and 22.

That assessments were made upon thimble skeins and pipe boxes, see testimony of George T. VanArsdale, record, p. 22.

For the amounts and times of payment to plaintiff in error of the taxes assessed, see receipts on pages 15, 16, 17 and 18 of record.

That plaintiff in error was collector of internal revenue for the first collection district of Wisconsin during the years 1867–8, see testimony of Lorenzo Janes, record p. 13, and see testimony of George Q. Erskine, record, p. 35.

That these taxes were paid to plaintiff in error under protest, see testimony of Lorenzo Janes, record, pp. 13, 14, 15, 18, 19 and 20 and testimony of George T. VanArsdale, record, pp. 22, 23, 24, 25, 28, 29, 30 and 31.

That the plaintiff in error before each payment of the taxes in question served upon the defendants in error a notice when the tax became due, and that if not paid when due he would collect with the addition of a penalty and interest. See notice on page 35 of record, testimony of Lorenzo Janes, record, pp. 15 and 18, testimony of Van Arsdale, record, pages 23 and 24, and testimony of George Q. Erskine, record, p. 35.

As to the process of manufacturing thimble skeins and pipe boxes, and the cost of the manufacturing process upon them after they are cast as compared with the cost of the castings, see testimony of George T. VanArsdale, record, pp. 25, 26, 27, 33 and 34.

That an appeal was taken to the Commissioner of Internal Revenue and decided adversely to the defendants in error prior to the commencement of this suit, and that the suit was commenced within six months after such decision. See record, pp. 5, 27 and 28.

For the judge's charge to the jury, and the instructions requested by the plaintiff in error and refused, see record, pp. 37, 38 and 39.

POINT I.

The thimble skeins and pipe boxes in question were exempt from the tax imposed upon them as castings and from any internal tax.

Sec. 11, Chapter 169, 14 Statutes at Large, 476, is as follows:

Sec. 11. "*And be it further enacted*, That on and after March 1st, 1867, in addition to the articles now exempt by law, the articles and products hereinafter enumerated shall be exempt from internal tax, namely:

(Here follows a long list of articles, and on page 477 we find the following:)

"Tags for merchandise and direction of cloth, paper or metal, whether blank or printed, *thimble skeins and pipe boxes made of iron.*"

This statute exempts these articles made of iron from and after March 1st, 1867, and was applicable to all of the thimble skeins and pipe boxes upon which the taxes in question in this suit were assessed.

It will also be observed that the above statute is in addition to the exemption statute referred to in the Cheney case.

We will leave this point by calling attention to our argument in point No. 1, of our brief in the Cheney case, and ask that it may be considered in this connection.

POINT II.

The same as point No. 2, in Cheney case.

POINT III.

The same as point No. 3 in Cheney case, with this addition —that we desire to call the attention of the court to the following statute as applicable to this and not to the Cheney case, and claim it is an additional reason why the payments of the taxes involved in this suit were compulsory and not voluntary and therefore that a protest was not necessary.

The statute is a part of Sec. 10, Chapter 169, 14th Statutes at Large, 475, and is as follows:

"That section nineteen is hereby amended by adding the following thereto: *And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.*"

By this statute every legal weapon in the hands of the tax payer by which he could prevent the assessment or collection of an illegal tax was swept away. On the other hand, in case of non-payment, the collector was clothed by law with the power not only to add a penalty and interest, but to enforce collection of the tax, whether legal or illegal, by the summary process of distraint and sale of property. The person taxed powerless, because deprived of every means of resistance, while the officer of the government possesses ample power to enforce payment of the tax. Can it be that a payment made under such circumstances is a voluntary one, unless a formal protest or objection is made? We should say not. In order that an act be voluntary the actor must have the power to choose, to do or not to do as he wills it. But here, where is the opportunity for a choice? The person taxed cannot say: "I will test the validity of this tax in the courts before paying it;" but he must first pay and then seek his remedy afterwards. We hardly think this court will say that a protest is necessary under such circumstances.

POINT IV.

Same as point No. 4 in Cheney case.

POINT V.

Interest was properly allowed to the defendants in error from the time they paid the taxes to the collector up to the time of the rendition of the verdict.

This is not an ordinary debt due from the government. The government by virtue of its sovereign power compelled these

defendants in error, its citizens, to pay their money into the public treasury. This money was exacted upon an illegal tax and the defendants in error had no remedy but to pay; we say that it would be most unjust not to allow interest under such circumstances. Interest is not allowed upon ordinary debts due from the government, because it is said that the government is always ready and willing to pay such debts; but such is not the case with claims of this kind. Payment of the illegal tax is first exacted, then the party paying is first compelled to appeal to the Commissioner of Internal Revenue for redress, and if he fails there he must bring suit against the collector. In case of recovery the government by its statutes has agreed to repay to the collector (not to the party who paid the money and recovered the judgment) the full amount of such sums of money as shall be recovered against him with the cost and expenses of suit. See 14th Statutes at Large, 111. This statute is broad enough to cover the repayment to the collector of any interest that may be recovered against him. Now we submit, if it is not legal, just and equitable to allow interest in a recovery against the collector under such circumstances.

Todd vs. United States, Devereux's report of the Court of Claims, 175.

Beaugrand vs. United States, Ibid, 95.

Baird vs. United States, Ibid, 188

Gay vs. United States, Ibid, 96.

Tillon vs. United States, 1 Nott & Huntingdon's, Rep. 220.

When interest is due on duties illegally exacted.

Godfrey's case. Decisions of the Joint Commission, 301. Wirgman's case, Ibid, 311, The Great Western Steamship Co. Ibid, 328.

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